

DOCKET NUMBER 8

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Petitioning creditor Alan Stanly ("Stanly") respectfully submits this Memorandum of Points and Authorities in Opposition to Alleged Debtor Francis Lopez's ("Lopez") Motion to Dismiss or Transfer Involuntary Petition (the "Motion").

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I. INTRODUCTION

2 Alan Stanly (Stanly) is one of the three known creditors of Francis J. Lopez (“Lopez”). All
3 three of those creditors are located in the Southern District of California. Lopez lived, and
4 engaged in business with Stanly here from 1993 to 2003. When his fraudulent and dishonest
5 business practices came to light litigation ensued and Lopez cut and ran — making good on his
6 long-standing threat to render himself “*Judgement proof*” and moving to Florida.

7 His absence from this jurisdiction proved to be no impediment to his desire to actively
8 engage in the California litigation that sprang up before and after his strategic departure. That
9 participation included both civil litigation in the State Court — in multiple cases — and in the
10 Involuntary Bankruptcy case that he engineered for his former corporate enterprise. Beyond
11 continuous litigation in the California, Lopez still maintains business actively here through several
12 corporate entities. He is in reality a California debtor- in-exile hoping that the heat will dissipate.

When all of the creditors remedies available under State law proved impotent against the elusive and resourceful Mr. Lopez, Stanly turned to the creditors remedy of last resort — an involuntary petition under 11 U.S.C § 303. Through that petition he seeks to realize upon whatever collection entitlements are available — including those that can be realized through the exercise of a trustees avoidance powers.

18 The Southern District of California is where the sordid saga of Lopez's misconduct began,
19 where its victims remain, where it's witnesses are reposited, and where it should end. The
20 entitlement to relief under section 303 is both clear and convincing. The logic and propriety of
21 exercising that relief here in the Southern District of California is equally clear. The Motion to
22 Dismiss the case or change its venue, approaches the frontiers of frivolity — if they have not
23 crossed them outright. Both motions should be denied.

II. FACTUAL BACKGROUND

25 The facts relevant to the resolution of this motion are fully set forth in the Declaration of
26 Alan Stanly, etc. (the "Stanly Decl."), and the Declaration of Timothy P. Dillon, etc (the "Dillon
27 Decl.") filed concurrently herewith, both of which are incorporated herein by this reference, and
28 may be summarized as follows:

- 1 • Stanly is eligible to act as a petitioning creditor herein. He is owed claims having a
2 principal value of \$50,000.00 on account of an unpaid judgment¹ and \$2,000.00 based on
3 an unpaid sanctions award.² These judicial awards were consequences of Lopez's business
4 activity in the State of California in the decade that ran from 1993 through March, 2003,³
5 and his "repeated and consistent discovery shenanigans" in pending litigation.⁴
- 6 • Between 1993 and March, 2003, Lopez and Stanly had a business relationship. During
7 that time Lopez engaged in an attempt to loot the assets of their enterprise, breached
8 fiduciary duties owed to both Stanly and the enterprise, and actually engaged in
9 competitive activity for his own benefit at the expense of their common enterprise.⁵ In the
10 face of the failed business relationship, Lopez made a quick sale of his Carlsbad residence
11 at a "fire sale" price, and made good on his prior threats to make himself "judgment proof,"
12 and flee to Florida to evade his creditors.⁶
- 13 • Despite his Florida residency, Lopez was able to litigate vigorously against Stanly, and
14 Union Bank of California, in a variety of legal actions conducted here in the Southern
15 District of California.⁷ To accommodate his litigation ventures, Lopez has three attorneys
16 in the San Diego and Los Angeles areas: Joseph Fischbach, Thomas Gorrill, and Jonathon
17 Hayes.⁸ Lopez has regularly traveled to California to attend depositions in the cases in
18 which he is involved.⁹ He has also traveled from Florida to San Diego for the purpose of
19 giving testimony against in a case in which he had no involvement (*Stanly v. Business*
20 *Furniture Group*).¹⁰
- 21 • When the Lopez/Stanly litigation over the Prism Advanced Technologies, Inc. enterprise
22 ("Prism") escalated, Lopez and Stanly stipulated to the appointment of Richard M.
23 Kipperman as a receiver in that litigation.¹¹ When Mr. Kipperman agreed to terms of sale
24 of the Prism assets to Stanly in that receivership case, Lopez was able to orchestrate the

1 Stanly Decl. at ¶ 2 (A).

2 Stanly Decl. at ¶ 1 (B).

3 Stanly Decl. at ¶ 9.

4 Stanly Decl. at ¶ 2 (B) and Exhibit 2 (Referee's Report at P.2, ¶ B (Finding that he
5 "repeatedly and consistently failed to comply [with discovery request] in the face of relentless and
6 persistent pursuit by the defendant's, necessitating numerous letters and motions to compel
7 compliance").

8 Stanly Decl. at ¶ 9, and ¶ 13.

9 Stanly Decl. at ¶ 4.

10 Stanly Decl. at ¶ 14.

11 Stanly Decl. at ¶ 16.

12 *Id.*

13 Stanly Decl. at ¶ 16.

14 Stanly Decl. at ¶ 17.

1 filing of its involuntary proceeding to block the sale.¹² That case entitled *In Re Prism*
 2 *Advanced Technologies, Inc.* (Case No. 03-7777-M7)(the "Prism Bankruptcy") is still open
 3 and active at this time.¹³

- 4 • Despite his Florida residency, Lopez was a vibrant and active participant in the Prism
 5 Bankruptcy.¹⁴
- 6 • While residing in Florida, Lopez actually tried to get Gregory Akers — the Chapter 7
 7 Trustee to effectively sale Prism's assets to him on a payment scheme that envisioned the
 8 sale of Prism's "source code" (its asset of primary value) through a marketing program of
 9 some type.¹⁵
- 10 • Despite his Florida residency, Lopez continues to vigorously pursue his litigation in the
 11 San Diego Superior Court.¹⁶
- 12 • In addition to his litigation activities through no less than five entities located in the State
 13 of California.¹⁷
- 14 • The evidence in the record discloses only California creditors. They are Stanly,
 15 Alternative Resolution Center (*ex rel* Hon. H. Lee Sarokin), and Union Bank of
 16 California.¹⁸
- 17 • Prior to filing his petition in this case, Stanly conducted a Judgment Debtor's Exam of
 18 Lopez in Florida.¹⁹ The evidence gleaned from that examination showed that Lopez
 19 claimed to have no income or nor did he appear to have any non-exempt assets of
 20 consequence located in the State of Florida that would be available to his creditors.²⁰
- 21 • Prior to filing the petition facts within Stanly's knowledge made it apparent that there was
 22 a factual basis for a Bankruptcy Trustee to exercise his avoidance powers for the benefit of
 23 all creditors,²¹ such litigation would involve parties and witnesses more likely to be in
 24

18 ¹² Stanly Decl. at ¶ 18.

19 ¹³ See Stanly's "Request for Judicial Notice, etc." filed concurrently herewith ("RJN")
 20 Item 1, Exhibit 1 (Case Docket).

21 ¹⁴ Stanly Decl. at ¶ 19; see also IV (F) below, and the RJN references to his activity
 22 and participation contained therein.

23 ¹⁵ Stanly Decl. at ¶ 19.

24 ¹⁶ Dillon Decl. at ¶ 3; Stanly Decl. Exhibits 2 and 9-12.

25 ¹⁷ Stanly Decl. at ¶¶ 22 and 23.

26 ¹⁸ Stanly Decl. at ¶¶ 6 and 25.

27 ¹⁹ Stanly Decl. at ¶ 3.

28 ²⁰ *Id.*

29 ²¹ Stanly Decl. at ¶ 4.

California than Florida.²² Lopez appeared to have business assets here in the State of California.²³

- There is no evidence in the record indicating why Lopez cannot participate as effectively in this Bankruptcy proceeding as he did in the Prism Bankruptcy case or other California litigation in which he has maintained since 2003.

III. SUMMARY OF ARGUMENT

1. Lopez has failed to properly present or prove his contention that he has 12 or more creditors.

2. The facts rendering Stanly's venue selection valid, pursuant to 28 U.S.C. §1408(2), are conceded. There is no evidence establishing that creditors, the Trustee, or other parties would be better served by a change in venue.

3. This petition is a good faith attempt to exercise the creditors' remedies through the bankruptcy process, and cannot be construed as a "*litigation tactic*."

IV. ARGUMENT

A. STANDARD OF REVIEW

(1) In General - Motion to Dismiss. In a 12(b)(6) facial attack on the complaint, the court must consider the allegations of the complaint as true.²⁴ The motion will be denied unless the allegations appear to be frivolous.²⁵

This strict standard exists because a motion to dismiss for failure to state a claim under Fed.R. of Civ.P. 12(b)(6) is disfavored and rarely granted: a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts

Stanly Decl. at ¶ 5.

²³ Stanly Decl. at ¶¶ 10 and 26.

²⁴ *Mortensen v. First Federal S & L Ass'n*, 549 F.2d 884, 891 (3rd Cir.1977); see also, *NL Indus. Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986).

²⁵ See *Black v. Payne*, 591 F.2d 83, 86 n. 1 (9th Cir.), cert. denied, 444 U.S. 867, 100 S.Ct. 139, 62 L.Ed.2d 90 (1979); *Barapind*, *supra*, 72 F.Supp.2d at 1141.

1 in support of his claim which would entitle him to relief.²⁶ With these principles in mind the
 2 Motion to Dismiss can not be granted. Lopez never explains why — assuming the allegations of
 3 the petition are true — the petition is frivolous. All he really does is assert in a conclusory fashion
 4 that he has more than 12 creditors and is generally paying his debts as they become due (even
 5 though he admits that he is not paying Stanly).²⁷ That is simply a denial of the allegations, and
 6 properly asserted in an Answer, not a Rule 12 Motion. Having failed to meet this basic standard,
 7 the Motion to Dismiss must be denied.

8 **(2) Where Treated as a Summary Judgment Motion.**

9 A motion to dismiss for failure to state a claim upon which relief can be granted may be
 10 treated as one for summary judgment and disposed of as provided in Rule 56.²⁸ Tested against this
 11 standard Lopez' Motion must fail because did he provide any admissible evidence establishing
 12 that there is no dispute as to material facts, and that based on undisputed facts he is entitled to
 13 judgment as a matter of law. Thus the Motion can not be granted if it is considered as a motion
 14 for summary judgment under Rule 56. The conclusory assertion that Stanly's petition failed to
 15 state a claim for which relief can be granted is insufficient for a determination of the case in his
 16 favor.

17 Rule 12 (b) states, in part, as follows:

18 If, on a motion asserting the defense numbered (6) to dismiss for
 19 failure of the pleading to state a claim upon which relief can be
 20 granted, matters outside the pleading are presented to and not
 21 excluded by the court, the motion shall be treated as one for
 22 summary judgment and disposed of as provided in Rule 56, and all
 23 parties shall be given reasonable opportunity to present all material
 24 made pertinent to such a motion by Rule 56.

25 Because Lopez introduced evidence in support of his Motion, it should be treated as a motion for

26 *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957);
 27 *Barapind v. Reno*, 72 F.Supp.2d 1132, 1140-1141(E.D. Cal. 1999).

28 Lopez Decl. at P. 10, Lines 26-27.

29 *Stands Over Bull v. Bureau of Indian Affairs* 442 F.Supp. 360, 368 (D.C.Mont.
 30 1977); citing F.R.Civ.P. 12(b); *Faulkner v. Federation of Preschool and Community Education*
 31 *Centers, Inc.*, 564 F.2d 327, 328 (9th Cir.1977).

1 summary judgment. Under that treatment, the Motion must fail. Rule 56(c) provides that "[t]he
 2 judgment sought shall be rendered forthwith if the pleadings, depositions, answers to
 3 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
 4 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter
 5 of law. . . ." Here, Lopez motion is too bereft of solid evidence to support his burden of proof and
 6 can not support a judgment in his favor:

7 The question presented by a motion for summary judgment is one of
 8 law and if a genuine issue of material facts exists, the motion must
 9 be denied. [footnote omitted.] 6 Moore's Federal Practice, P 56.01,
 10 et seq., p. 56-1. The party moving for summary judgment has the
 burden of clearly establishing the non-existence of any genuine
 issue of fact that is material to judgment in his favor. 6 Moore's
 Federal Practice, Pt. 2, P 56.15(4), p. 56-511.²⁹

11 Rule 56(e) requires that only admissible evidence can support a motion for summary judgment.
 12 Because Lopez offered only scant, and inadmissible evidence in support of his Motion, the Motion
 13 must be denied.

14 **B. LOPEZ HAS FAILED TO PROPERLY PRESENT AND PROVE HIS
 15 CONTENTION THAT HE HAS MORE THAN 12 CREDITORS.**

16 Attempting to preempt Stanly's bankruptcy relief, Lopez contends that he has more than
 17 12 creditors, a fact that would negate Stanly's ability to commence the proceeding as sole
 18 petitioner.³⁰ The tactic is sufficiently common amongst alleged debtors that the Federal Rules of
 19 Bankruptcy Procedure specifically address the manner in which the issue is raised and addressed.
 20 That protocol is set forth in Rule 1003(b), which provides in its entirety as follows:

21 (b) **JOINDER OF PETITIONERS AFTER FILING.** If the
 22 answer to an involuntary petition filed by fewer than three creditors
 23 avers the existence of 12 or more creditors, the debtor shall file with
 24 the answer a list of all creditors with their addresses, a brief
 statement of the nature of their claims, and the amounts thereof. If it
 appears that there are 12 or more creditors as provided in § 303(b)
 of the Code, the court shall afford a reasonable opportunity for other
 creditors to join in the petition before a hearing is held thereon.

25 ///

26
 27 ²⁹ *Stands Over Bull, supra*, 442 F.Supp. at 368.

28 ³⁰ Lopez Declaration at P. 10, Line 26.

1 It is obvious from the rule that the ability of a sole petitioning creditor to solicit the support
 2 of other creditors is an important policy consideration. On its face the rule requires that the issue
 3 be raised in an “*answer to an involuntary petition*,” which arguably suggests that the issue is not
 4 amenable to resolution under a motion for dismissal pursuant to Rule 12. However, even if the
 5 use of the term “*answer*” in the rule could be construed broadly enough to include any responsive
 6 pleading — such as a motion under Rule 12 — it remains clear that the policy underlying the rule
 7 would still require compliance with the disclosure protocol with regard to the names, addresses,
 8 and “*brief statement of nature of claims and amounts*” mandated by rule. Were it otherwise, then
 9 this important policy could be frustrated by the simple procedural gambit of responding via Rule
 10 12 motion rather than answer.

11 Even though Lopez concedes his awareness of the rule³¹ he fails to comply with its
 12 requirements. Obviously the bold allegation that there exists more than 12 creditors is insufficient
 13 to satisfy either the specific disclosure requirements of Rule 1003(b), or preserve the policy which
 14 it exists to protect. Simply put, Lopez has failed to provide any evidence that he in fact has more
 15 than 12 creditors, and the Motion to Dismiss cannot be granted upon that basis.

16 **C. LOPEZ OFFERS NO EVIDENCE OF HIS ALLEGED TWELVE CREDITORS**

17 11 U.S.C. § 303(b)(2) allows a single creditor to file an involuntary petition against an
 18 alleged debtor where there are fewer than twelve creditors. Lopez has a duty to name his creditors
 19 and list their addresses if he claims there exist twelve or more.³²

20 Lopez cannot transfer his burden of proving the existence of twelve creditors to Stanly
 21 through his Motion. He cannot claim to have twelve creditors as a defense to the petition in an
 22 attempt to have it dismissed while refusing to name any of these purported creditors until and if he
 23

24
 25
 26 ³¹ See Motion at P. 2, Lines 23 to 25.
 27
 28 ³² The assertion itself is really in the nature of an affirmative defense as to which he
 has the burden of proof. *In re Mayhew*, 194 B.R. 6, 6 (Bkrtcy.D.R.I.,1996). Federal Rule of
 Bankruptcy Procedure 1003(b); See Part IV (B), *supra*.

1 is required to answer.³³ In the interest of fairness, Lopez is required to provide the names and
 2 addresses of the witnesses supporting this affirmative defense:

3 [T]he purpose of the list is the same, and just as obviously a bare list
 4 of names and addresses, without more, does not accomplish that
 5 purpose of informing the creditors, not only of the names, but of the
 6 nature of the debts, and, most of all, of their dates and amounts.
 7 Such a bare list as that filed here smacks of a concealment of those
 8 facts for the purpose of embarrassment of the petitioners. If any
 9 creditor in the list be barred by the statute of limitation, the
 10 petitioning creditors need not negotiate or solicit such helpers to join
 11 in the bankruptcy; or, if the debts in the list be not provable debts in
 12 bankruptcy, they need not be counted, and negotiating with those
 13 creditors would be useless also; and so, in many contingencies to be
 14 imagined, *this full information is necessary to guide the creditors in
 15 their further proceedings.* Clearly, therefore, at least the dates and
 16 amounts should be given, and, moreover, it is useful to know
 17 whether the debt be due by note, account, etc., and when due,
 18 whether secured or not; and all such particulars, as fully disclosed as
 19 they would be in the schedules after adjudication, would be most in
 20 accordance with the analogies of the practice under former
 21 statutes.³⁴

22 Lopez cannot be allowed to dismiss this petition without his providing *any* support for this
 23 defense.

24 **D. THE PROPRIETY OF STANLY'S CHOICE OF VENUE IS BOTH CONCEDED
 25 AND ENTITLED TO DEFERENCE.**

26 Lopez does not contend that 28 U.S.C. § 1408(2) does not apply to this case. In fact he
 27 contends the facts that make it apply.³⁵

28 "[U]nder Ninth Circuit law, a plaintiff's choice of forum is accorded substantial weight in
 29 proceedings under this section, and courts generally will not transfer an action unless the
 30 'convenience' and 'justice' factors strongly favor venue elsewhere."³⁶ Here, the interests of justice
 31 and convenience strongly favor maintaining the venue chosen by Stanly.

32
 33 Motion, P.2, Lines 24-25.

34
 35 *W.A. Gage & Co. v. Bell*, 124 F. 371, 378 (D.C.Tenn. 1903). (Concerning the
 36 Bankruptcy Act of July 1, 1898). (emphasis added.)

37
 38 35 Lopez Decl. at P. 10, Lines 7-08 (showing Prism as his affiliate).

39
 40 36 *Florens Container v. Cho Yang Shipping*, 245 F.Supp.2d 1086, 1092
 41 (N.D.Cal.,2002); citing *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th
 42 Cir.1985).

1 Where an involuntary petition was filed against an alleged debtor in Georgia, but the
 2 alleged debtor claimed to be domiciled in New York and later filed a voluntary petition there, the
 3 venue in Georgia was proper because, similar to Lopez, "[t]he debts were all contracted while he
 4 was in business there; his present business is in connection with the corporation which succeeded
 5 his former firm; . . . ; the creditors desire the investigation to be had there, and [] the investigation
 6 will be most convenient and effective."³⁷

7 Similarly, where an involuntary petition was filed in Hawaii where a general partnership
 8 debtor's largest secured creditor, principal asset and records were located and where 4 related state
 9 and federal court cases were pending, the venue should remain in Hawaii and should not be
 10 transferred to Texas, where the general partnership and partners reside.³⁸ Concerning the existing
 11 collateral court cases, the bankruptcy court in Hawaii stated:

12 The relationship of the Debtor with other pending cases is a factor
 13 that must be considered. *In re Island Club Marina, supra.* Any
 14 liquidation of assets of the Debtor will have an impact on any
 15 judgments rendered by the courts in Hawaii, and to this extent,
 16 effective administration of the estate dictates that all proceedings are
 17 adjudicated within the same forum.³⁹

16 **E. THE INVOLUNTARY PETITION WAS FILED IN THE PROPER VENUE**

17 Lopez moved to Florida in or about July 2003 and therefore claims to be immune from this
 18 involuntary petition. However, multiple reasons exist as to why this is exactly the proper venue
 19 for the petition. 28 U.S.C. section 1408 governs the venue of filings under the Code:

20 Except as provided in section 1410 of this title, a case
 21 under title 11 may be commenced in the district court
 22 for the district--

23 (1) in which the domicile, residence, principal place
 24 of business in the United States, or principal assets in
 25 the United States, of the person or entity that is the
 26 subject of such case have been located for the one
 27 hundred and eighty days immediately preceding such
 28 commencement, or for a longer portion of such
 29 one-hundred-and-eighty-day period than the
 30 domicile, residence, or principal place of business, in

28 ³⁷ *In re Waxelbaum*, 98 F. 589, 592 (D.C.N.Y. 1899).

29 ³⁸ *In re Kona Joint Venture I, Ltd.*, 62 B.R. 169 (Bkrtcy.D.Hawaii,1986).

30 ³⁹ *In re Kona Joint Venture I, Ltd., supra*, 62 B.R. at 173.

the United States, or principal assets in the United States, of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership. (emphasis added.)

Lopez, as the party requesting the transfer, has the "burden of proving that the transfer would be in the interest of justice and for the convenience of the parties."⁴⁰ "The party seeking a transfer cannot rely on vague generalizations as to the convenience factors. The moving party is obligated to identify the key witnesses to be called and to present a generalized statement of what their testimony would include."⁴¹

Lopez's affiliate, Prism, has a pending Chapter 7 case in the Southern District Bankruptcy Court, and there may yet be contempt proceedings in that case if he fails to comply with Judge Meyers' Turnover Order.⁴² And, Lopez has numerous other business, legal and personal contacts with San Diego County and with the State of California that require the involuntary petition to remain here.

Lopez lived and worked in California from 1993 until just two years ago. Nearly all of his debts were created through his California activities. He has only two assets: his home in Florida (unavailable to most creditors because it is held as a tenancy by the entirety) and his California claim to the Prism software, which he values at \$115,029.00.⁴³

Lopez has continuing contacts with California including four separate lawsuits and his retention of three attorneys. Lopez also owns at least a 50 percent interest in five California business entities.

This Court's consideration of the Lopez Motion requires a fact-based analysis to determine the convenience and fairness of the forum to the debtor and all of his creditors. Where the source

⁴⁰ *In re Jolly*, 106 B.R. 299, 300 (Bkrtcy.M.D.Fla.,1989); citing *In re One-Eighty Investments, Ltd.*, 18 B.R. 725, 728 (Bankr.E.D.Ill.1981); citing *In re Commonwealth Oil Refining Co.*, 596 F.2d 1239 (5th Cir.1979) cert denied, 444 U.S. 1045, 100 S.Ct. 732, 62 L.Ed.2d 731 (1980).

⁴¹ *Florens Container v. Cho Yang Shipping*, 245 F.Supp.2d 1086, 1093 (N.D.Cal.,2002).

Stanly Decl. at ¶ 21.

Claim Register No. 4, filed January 12, 2004.

1 of the discovery is located in California, like here, the venue should remain in California.⁴⁴ "A
 2 plaintiff's choice of forum should not be lightly disturbed."⁴⁵ This Court should retain its
 3 jurisdiction over this petition because it makes no sense to educate another court on what is
 4 already being litigated here.

5 **1. Lopez's Affiliate Has a Pending Chapter 7 Case in this Court**

6 Lopez is a 50% owner of a corporation that has a pending involuntary Chapter 7
 7 bankruptcy petition in the Bankruptcy Court of the Southern District of California, Case No. 03-
 8 07777-JM.⁴⁶ Bankruptcy Code section 101(2)(B) defines an "affiliate" as a "corporation 20
 9 percent or more of whose outstanding voting securities are directly or indirectly owned,
 10 controlled, or held with power to vote, by the debtor. . . ." Because Lopez owns 50% of Prism's
 11 stock, Prism is an affiliate of Lopez and the venue requirement is met.

12 Because there exists a pending Chapter 7 case in this Court concerning an affiliate of the
 13 Alleged Debtor, the venue requirement of section 1408 is satisfied. However, the Court's analysis
 14 should also include consideration of the convenience of this forum to Lopez and his creditors, and
 15 of the interests of justice related thereto. The burden of proving the propriety of such a transfer is
 16 on Lopez. The factors to be considered include: "(1) the proximity of creditors of every kind to the
 17 court, (2) the location of the debtor's assets, (3) the proximity of the debtor to the court, (4) the
 18 proximity of witnesses necessary to the administration of the estate, and (5) the economic
 19 administration of the estate."⁴⁷ Four of these five factors lie in favor of this Court's retention of
 20 this case.

21 Lopez has less than twelve creditors, and the known creditors are located in California.⁴⁸
 22 And, as discussed above, Lopez has two assets, a home and Florida that he recently purchased
 23

24 ⁴⁴ See, e.g., *In re Gentry Steel Fabrication, Inc.*, 325 B.R. 311, 318
 25 (Bkrtcy.M.D.Ala.,2005).

26 ⁴⁵ *Florens Container v. Cho Yang Shipping* 245 F.Supp.2d 1086, 1094
 27 (N.D.Cal.,2002).

28 ⁴⁶ See ¶ 1, Declaration of Francis Lopez in Opposition to Motion for Relief from
 Stay, Southern District Bankruptcy Case No. 03-0777-INV7, Docket Item No.----.

29 ⁴⁷ *In re Seton Chase Associates, Inc.*, 141 B.R. 2, 5 (Bkrtcy.E.D.N.Y.,1992); See also
 Bankruptcy Rule 1014(a)(1).

30 ⁴⁸ Stanly Decl., ¶ 6.

1 with his wife and his California claim against Prism. All of the witnesses except Lopez reside in
 2 California.⁴⁹ Because Lopez is already involved in the pending bankruptcy action of his affiliate
 3 in this Court, having his case heard here would provide for the economic administration of his
 4 estate. Lopez has had extensive involvement in the Prism bankruptcy case from its inception
 5 through the final sale hearing. The Prism case is ongoing and as recently as October 2004, Stanly
 6 made a successful motion for the turnover of documents by Prism's secretary.⁵⁰ And, Lopez has
 7 filed a claim for \$115,029.00 against Prism in this Court.⁵¹ Having both cases heard in the same
 8 district is in the best interests of both entities' creditors. To proceed in the Northern District of
 9 Florida would be extremely inconvenient to Stanly and Lopez's other California creditors, and
 10 may hamstring the Trustee's efforts to prosecute avoidance actions.

11 **2. Lopez Has Had Multiple State Court Actions Pending in San Diego
 12 County**

13 Other than its affiliate's bankruptcy, Lopez currently is a party to four state court actions in
 14 San Diego County. The first case filed was *Prism Technologies and Lopez v. Stanly*, San Diego
 15 Superior Court Case Number GIN 028765 filed on April 3, 2003. This case was brought by
 16 Lopez alleging civil harassment. The second case, filed on May 14, 2003, is *Lopez and Prism
 17 Advanced Technologies v. Stanly*, San Diego Superior Court Case Number GIN 029692. In this
 18 case Lopez alleges causes of action for damages for money damages. Lopez is a defendant in the
 19 other two cases alleging breach of contract, *Union Bank of California v. Lopez*, San Diego
 20 Superior Court Case Number GIN 030827 and *Pacific Carlsbad Partners, LLC v. Prism Advanced
 21 Technologies, Lopez and Stanly*, San Diego Superior Court Case Number GIC 813397, both filed
 22 on June 26, 2003. Stanly has obtained a \$50,000.00 judgment against Lopez in the Union Bank
 23 case.⁵²

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 27 ⁴⁹ Stanly Decl., ¶ 7.

28 ⁵⁰ Stanly Decl., ¶¶ 20 and 21.

29 ⁵¹ Case 03-7777, Claim Register No. 4, filed January 12, 2004.

30 ⁵² Stanly Decl., ¶¶ 14 and 15.

1 Lopez currently has three retained attorneys in the San Diego and Los Angeles areas.⁵³
 2 Throughout these cases, Lopez has been willing to regularly travel to California to attend
 3 depositions.⁵⁴

4 **3. Lopez Has Numerous Other Contacts with California**

5 Venue in the Southern District of California is proper because Lopez continues to maintain
 6 business interests in California. And, most of the employees for his new business, Noveon
 7 Systems, Inc., were his same employees from Prism--and all continue to reside in California.⁵⁵

8 Lopez continued to own at least a 50 percent interest in five California business entities
 9 including:⁵⁶

- 10 1. Prism Advanced Technologies.
- 11 2. Cambria Holdings, LLC
- 12 3. F2 Systems Technology, Inc.
- 13 4. Prism Freight Services, Inc. (Lopez and Wife)
- 14 5. Metro Consolidation Carrier, Inc.

15 **F. THE PETITION IS NOT A LITIGATION TACTIC AND WAS FILED IN GOOD
 FAITH**

17 Lopez claims that the petition was filed as a tactic to "remove" him as the plaintiff in the
 18 State Court litigation. His claim first ignores the fact that such a tactic would be fatally flawed
 19 and frustrated by his absolute right under 11 U.S.C. section 706(a) to retain control of the
 20 litigation by converting to either Chapter 11 or 13⁵⁷ and controlling the litigation as a Debtor-in-
 21 Possession. It also ignores the reality that Lopez is at risk of losing his status as a plaintiff in the
 22 motion for summary judgement now pending against his claims.⁵⁸ Still, nothing could be further
 23 from the

24
 25 ⁵³ Stanly Decl., ¶ 16.

26 ⁵⁴ *Id.*

27 ⁵⁵ Stanly Decl., ¶¶ 22-23.

28 ⁵⁶ Stanly Decl., ¶ 23.

29 ⁵⁷ Assuming he acquires a regular source of income.

30 ⁵⁸ Dillon Decl., ¶ 3-4.

1 truth. In fact, Lopez refused to stipulate with Stanly to a lifting of the automatic stay to allow the
 2 state court action to proceed to trial.⁵⁹

3 This is yet another unsupported conclusory allegation made worse because of the fact that
 4 a single petitioning creditor is presumed to have filed the petition in good faith.⁶⁰ Lopez has
 5 offered no facts or evidence to rebut that presumption.

6 Contrary to the allegations set forth in the Motion, the petition cannot be dismissed and
 7 was not filed in bad faith. "There is a presumption of good faith in filing, and the burden is on the
 8 alleged Debtor to show bad faith by the Creditors."⁶¹ Here, Stanly is a creditor who wants to get
 9 paid and is concerned that the Lopez has absconded to Florida with his assets:

10 [T]he interest of a creditor in getting paid is not, by
 11 itself, properly regarded as bad faith. Also, even if
 12 there were what could be regarded as a two party
 13 dispute here, that by itself would not show bad faith
 14 filing. See *In re C-TC 9th Avenue Partnership*, 113
 15 F.3d 1304, 1311 (2nd Cir.1997) (listing existence of
 16 two-party dispute as one of eight factors indicative of
 17 bad faith filing of chapter 11 case).⁶²

18 The mere existence of other litigation does not create even an inference of bad faith. This
 19 petition was filed in good faith in order to utilize both the collection and avoidance powers
 20 conferred by the Bankruptcy Code to create a fair and equitable distribution to all creditors.⁶³ It is

21 ⁵⁹ Stanly Decl., ¶ 30 and Exhibits 8-11.

22 ⁶⁰ *In re Crown Sportswear, Inc.*, 575 F.2d 991, 993 (1st Cir. 1978).

23 ⁶¹ *In re Mundo Custom Homes, Inc.*, 179 B.R. 566, 569 (Bkrtcy.N.D.Ill.,1995).

24 ⁶² *In re Paper I Partners, L.P.*, 283 B.R. 661, 680 (Bkrtcy.S.D.N.Y.,2002).(The eight
 25 factors include the following: (1) the debtor has only one asset; (2) the debtor has few unsecured
 26 creditors whose claims are small in relation to those of the secured creditors; (3) the debtor's one
 27 asset is the subject of a foreclosure action as a result of arrearages or default on the debt; (4) the
 28 debtor's financial condition is, in essence, a two party dispute between the debtor and secured
 creditors which can be resolved in the pending state foreclosure action; (5) the timing of the
 debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured
 creditors to enforce their rights; (6) the debtor has little or no cash flow; (7) the debtor can't meet
 current expenses including the payment of personal property and real estate taxes; and (8) the
 debtor has no employees. The debtor has only one asset. *In re C-TC 9th Avenue Partnership*, 113
 F.3d 1304, 1311 (2d Cir. 1997); citing *Pleasant Pointe Apartments, Ltd. v. Kentucky Hous. Corp.*,
 139 B.R. 828, 832. (W.D.Ky.1992).)

21 ⁶³ Stanly Decl. at ¶ 4.

1 for such purposes that section 303 exists, and using it for its intended purpose is the essence of
 2 good faith.

3 **G. THIS COURT SHOULD NOT ABSTAIN FROM HEARING THIS CASE**

4 Lopez argues — again without supporting evidence — that this Court should abstain from
 5 hearing this petition because "the interests of creditors and the debtor would be better served by
 6 dismissing this case" and because "this case reeks of bad faith." However, he completely failed to
 7 provide any factual or evidentiary support for these extreme allegations.

8 11 U.S.C. section 305 provides that:

9
 10 (a) The court, after notice and a hearing, may dismiss a case under
 this title, or may suspend all proceedings in a case under this title, at
 any time if--

11
 12 (1) the interests of *creditors* and the debtor would be
 better served by such dismissal or suspension; . . .

13 Dismissal under this section is an extraordinary remedy and should not be considered
 14 lightly:

15 The courts that have construed § 305(a)(1) are in
 16 general agreement that abstention in a properly filed
 17 bankruptcy case is an extraordinary remedy, and that
 18 dismissal is appropriate under § 305(a)(1) only in the
 situation where the court finds that both 'creditors' and
 the debtor' would be 'better served' by a dismissal.⁶⁴

19 Because Stanly and Lopez's other known creditors are located in California, they would be
 20 "better served" by having the petition heard here. Dismissal would clearly prejudice the creditor
 21 body. Where a creditor believes that his remedies "may be more swiftly and more beneficially
 22 employed" in an involuntary action, dismissal would cause prejudice to the creditor and is
 23 improper.⁶⁵ Here, Lopez has fled to Florida in the face of the litigation fall-out of his prior
 24 misconduct, in an attempt to evade Stanly and his other California creditors. Stanly and the
 25 Lopez's other creditors are entitled to an efficient, pari passu distribution of his assets and need not
 26 go across the country to obtain such relief.⁶⁶

27
 28⁶⁴ *In re Eastman*, 188 B.R. 621, 624 (9th Cir.BAP (Cal.),1995); see also *In re Edwards*, 214 B.R. 613, 620 (9th Cir.BAP (Wash.),1997).

⁶⁵ *Matter of Every*, 17 B.R. 685, 686 (Bkrtcy.Wis., 1982).

⁶⁶ *In re Paper I Partners, L.P.*, 283 B.R. 661, 679 (Bkrtcy.S.D.N.Y.,2002).

1 The test for abstention is as follows:

2 As the statutory language and legislative history demonstrate, the
 3 test under § 305(a) is not whether dismissal would give rise to a
 4 substantial prejudice to the debtor. Nor is the test whether a
 5 balancing process favors dismissal. Rather, the test is whether *both*
 6 the debtor and the creditors would be better served by a dismissal.⁶⁷

7 Because Stanly and others Lopez creditors would be prejudiced by the dismissal or transfer of this
 8 case, and because the Lopez has numerous and continuing contacts with California, this Court
 9 should maintain its jurisdiction over the petition.

10 **H. IT APPEARS THAT LOPEZ IS GENERALLY NOT PAYING HIS DEBTS AS
 11 THEY COME DUE**

12 Although his is really a disputed issue of fact that must be resolved at trial, we address it
 13 preliminary in the interests of academic regularity. Lopez has testified under oath that he has no
 14 income and no assets except for his home and the intellectual property that is the subject of the
 15 disputes in the California state court and bankruptcy actions. Section 303(h)(1) requires this Court
 16 to order relief against Lopez's after trial if it is found that "the debtor is generally not paying such
 17 debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as
 18 to liability or amount; . . ."

19 The Ninth Circuit has adopted a "totality of the circumstances" test to determine whether a
 20 debtor is generally paying its debts as they come due.⁶⁸ Lopez is not paying Stanly or his other
 21 creditors, including Alternative Resolution Center.⁶⁹ Other courts have considered the following
 22 factors to determine whether an Lopez is paying his debts as they are due:

23 Courts look at the number of claims that the debtor has not paid, the
 24 amounts of these unpaid claims, the materiality of the
 25 non-payments, and the debtor's overall financial condition and
 26 affairs. See, e.g., *Crown Heights Jewish Community Council v.
 27 Fischer*, 202 B.R. 341, 344 (E.D.N.Y.1996) (debtor was generally
 28 not paying its debts when it had failed to pay two money judgments
 29 of \$2,155,465.76 and \$275). The Court may also look at whether the
 30 debtor has terminated its business operations entirely, and whether
 31 the past debts that are due are extremely large in comparison to the
 32 debtor's assets. *In re B.D. Int'l Discount Corp.*, 701 F.2d 1071, 1074
 33 (2d Cir.1983) (debtor was generally not paying its debts as the debts

67 *In re Eastman*, 188 B.R. 621, 625 (9th Cir.BAP (Cal.),1995). (emphasis added)

68 *In re Focus Media, Inc.*, 378 F.3d 916, 928 -929 (9th Cir. 2004); see also *In re
 69 Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1072 (9th Cir. 2002).

69 Stanly Decl., ¶¶ 6 and 25.

1 became due when debtor had terminated its business operations
 2 completely, and its unpaid debts were extremely large compared to
 the debtor's assets).⁷⁰

3 Here, Lopez has no significant assets available to creditors in Florida, but he does have
 4 business interests and claims in California.⁷¹ He has not paid the debt that he owes to Stanly
 5 despite his robust collection efforts.⁷² He has testified under oath that he has no income.⁷³ Lopez
 6 gives all the signs that he generally not paying his debts as they come due.⁷⁴

7 **I. THE LOPEZ DECLARATION IS FALSE AND MISLEADING AND CANNOT
 FORM THE BASIS FOR ANY RELIEF.**

9 The only evidence that purports to support the Motion is the Lopez Declaration. However,
 10 that declaration suffers from both blatant falsehood and a subtle attempt to mislead. In paragraph
 11 2 of his declaration, Lopez asserts that he was sued by the Chapter 7 Trustee in the Prism
 12 Bankruptcy Case for the turnover of assets and resolved that suit by stipulation between himself
 13 and the Trustee.⁷⁵ The statement is false. A review of the case docket (RJN Item 1) clearly
 14 indicates that no adversary proceeding was commenced by the Chapter 7 Trustee against Lopez.
 15 Not surprisingly, the docket also fails to disclose any evidence of the stipulation referred to in the
 16 Lopez testimony. The turnover suit and its stipulation are both pure fiction.

17 Still in paragraph 2 of his declaration, Lopez contends that outside of being sued by the
 18 Trustee, he had "*no involvement in the Prism Bankruptcy Case.*"⁷⁶ The record of that case tells a
 19 different story. It reveals no less than five pleadings — all unrelated to any turnover action —
 20 were filed by Lopez as a party in that proceeding.⁷⁷ The Court's findings of fact and conclusions

22 ⁷⁰ *In re Paper I Partners, L.P.*, 283 B.R. 661, 677 (Bkrtcy.S.D.N.Y.,2002).

23 ⁷¹ Stanly Decl., ¶¶ 3, and 22- 24 .

24 ⁷² Stanly Decl. at ¶ 1 and 3.

25 ⁷³ Stanly Decl., ¶ 3.

26 ⁷⁴ At a minimum there is a triable issue of fact as to that element of the relief.

27 ⁷⁵ Lopez Declaration at P. 10, Lines 8 to 10.

28 ⁷⁶ Lopez Declaration at P. 10, Lines 10 to 11.

77 See RJN Item 1, Docket Item 21 (Lopez Declaration Opposing Extension Motion
 and Motion to Permit Sale by State Court Receiver), Docket Item 45 (Lopez Declaration in
 Opposition to Union Bank Relief from Stay Motion), Docket Item 67 (Supplemental Lopez

1 of law in connection with the confirmation of sale of assets to Stanly provides further evidence of
 2 active participation in the Prism Bankruptcy.⁷⁸ These items all corroborate Stanly's testimony
 3 concerning Lopez's "vibrant and active participation in the Prism Bankruptcy"⁷⁹ while
 4 contradicting the Lopez testimony concerning his lack of involvement.

5 In paragraph 4 of his declaration, Lopez testifies that he has no assets or business in
 6 California. That is not true. He continues to hold significant business interests in the Prism entity,
 7 Cambria Holdings, LLC, F2 Systems Technologies, Inc., Prism Freight Services, Inc., Metro
 8 Consolidation Carrier, Inc., holds a chose in action in the amount of \$115,029.00 in the Prism
 9 Bankruptcy Case,⁸⁰ and holds the choses of action in the *Lopez v. Stanly* (Case No. GIN 029692)
 10 case which is pending, and located here in the County of San Diego.⁸¹

11 These untruths are not the first instance of Lopez indulging in falsehoods while testifying
 12 under oath. He was willing to testify inaccurately with regard to this status as a "*mere employee*"
 13 of Noveon.⁸² Beyond outright falsehood, Lopez has no apparent reservation to including
 14 misleading characterizations as part of his testimony. The reference to the Stanly claims as
 15 "*purported debt*"⁸³ is an obvious attempt to create the impression that the claims are specious or
 16 uncertain, when in fact they have both resulted from judicial awards.⁸⁴

17 This manifest propensity to disregard the oath of a witness, as well duties of candor owed
 18 to the Court, render the Lopez testimony inherently suspect. It underscores the need for cross-
 19 examination, even in contested matters, as contemplated by Rule 9014(d) of the Federal Rules of
 20

21 Declaration Re Status of His "Marketing Efforts"), Docket Items 110 and 111 (Opposition
 22 Declarations filed on behalf of Lopez regarding proposed orders).

23 ⁷⁸ See RJD Item 2 (Findings of Fact) at p. 1, lines 23 to 25 - Lopez appearance by
 24 counsel); p. 3, lines 22-24 (expressed exclusion of certain Lopez claims from the "*free and clear*"
 25 nature of the sale); and p. 5, lines 14 to 22 (Lopez' affirmative participation regarding his turnover
 26 of corporate assets).

27 ⁷⁹ Stanly Declaration at ¶ 19.

28 ⁸⁰ Stanly Declaration at P. 23.

29 ⁸¹ Lopez Declaration at P. 10, Lines 13 to 15.

30 ⁸² Stanly Declaration at ¶ 28.

31 ⁸³ Lopez Declaration at P. 10, Line 27, and Stanly Declaration at ¶ 29.

32 ⁸⁴ Stanly Declaration at ¶ 1.

1 Bankruptcy Procedure. It should be discounted entirely; or, at a minimum, no relief should be
 2 granted to Lopez on account of his testimony until a full and fair opportunity for cross-
 3 examination has been provided.

4 **V. CONCLUSION**

5 Despite his officious protestations, Lopez has produced no evidence to support his request
 6 for radical and disfavored relief. In contrast, Stanly has made a virile demonstration — through
 7 admissible evidence — of his standing to seek this relief, and the propriety of obtaining it from
 8 this court. It is time for the process to begin in earnest. If Lopez eschews the Bankruptcy relief, he
 9 can put on his defense at trial. But he should not be permitted to expose his creditors to the
 10 increased risk of prejudice that unavoidably accompanies further delay.

11 For these, and all of the foregoing reasons, the motions should be denied in their entirety,
 12 and Lopez ordered to answer petition forthwith.

13
 14
 15 Dated: August 5, 2005

ROBBINS & KEEHN
 A Professional Corporation

16 By: //s// L. Scott Keehn

17 L. Scott Keehn
 18 Sarah H. Lanham
 19 Attorneys for Petitioning Creditor
 20 Alan Stanly